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d/b/a Hustler Club-San Francisco

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PETER E. KRESSY,

Case No.: C-07-4892-EDL

Plaintiff,

V.

LARRY FLYNT'S HUSTLER CLUB
SAN FRANCISCO, BS MANAGEMENT,
SAW ENTERTAINMENT LTD. –
HUSTLER

Defendants

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO COMPEL ARBITRATION AND
STAY COURT PROCEEDINGS**

Date: December 18, 2007
Time: 9:00 a.m.
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte
(Magistrate Judge)

Trial: None Set
Action Filed: September 20, 2007

I. INTRODUCTION

As set forth in the moving papers of Defendants SAW Entertainment, Ltd. d/b/a Hustler Club San Francisco (“Hustler”) and Defendant BS Management (“BSM”). Plaintiff *in pro*

1 *per* Peter E. Kressy (“Plaintiff”) signed a binding agreement to arbitrate “all claims or
 2 controversies arising out of Employee’s employment or termination,” including claims arising out
 3 of “wage and hour law.” Plaintiff’s instant complaint seeks allegedly unpaid wages and overtime
 4 wages under the Fair Labor Standards Act. Accordingly, Plaintiff’s claims are subject to the
 5 arbitration agreement.

6 Plaintiff has failed to file any opposition to this motion.

7 For the reasons set forth in their moving papers, this Court should issue an order
 8 compelling arbitration of all Plaintiff’s claims and staying the instant court proceedings.

9 **II. FACTS**

10 On November 8, 2007, Defendants Hustler and BSM served Plaintiff by mail and
 11 via the e-filing process with its notice and motion for an order compelling submission of claims to
 12 binding arbitration and staying the instant court proceeding. This notice gave Plaintiff 40 days
 13 notice of the December 18, 2007 hearing. Per Northern District Rule 7-3(a), Plaintiff’s
 14 opposition to this motion was due on November 27, 2007. To date, however, Plaintiff has filed
 15 no opposition whatsoever.

16 **III. LEGAL ANALYSIS**

17 As set forth in Defendants’ moving papers, Plaintiff brings various wage and hour
 18 claims under the Fair Labor Standards Act (“FLSA”) against his former employer, Hustler, and
 19 against BSM, an entity for which he never worked. Defendants submitted as Exhibit A to the
 20 Declaration of Gregory Ruffin the Arbitration Agreement Plaintiff signed that encompasses all
 21 the his claims. Defendants also cited the Federal Arbitration Act and applicable authority
 22 establishing the general applicability of the FAA to employment-based claims. See, e.g., Circuit
 23 City Stores v. Adams (2001) 532 U.S. 105, 114-119.

24 Likewise, Defendants cited to authority for the proposition that purportedly
 25 contradictory state laws (such law is California Labor Code § 229) are preempted by the FAA
 26 and, moreover, that the arbitration agreement nevertheless comports with the dictates of
 27 California law covering arbitration agreements relating to statutory employment claims. See, e.g.,

1 Armendariz v. Foundation Health Psychcare (2000) 24 Cal.4th 83.

2 Finally, Defendants established that they are both entitled to enforce the arbitration
 3 agreement, which, by its express terms, applies to Hustler and its “agents and employees.” As
 4 noted, Plaintiff generally alleges an agency relationship between the Defendants; as such both
 5 named Defendants are entitled to enforce the contract to arbitrate.

6 Under the Local Rules of the Northern District, the nonmoving party is required to
 7 serve and file either opposition papers or a written statement of nonopposition. See, Rule 7-9.
 8 Where a party fails to file a timely opposition, the Court may grant the motion without a hearing.
 9 See, e.g., Ghazali v. Moran (9th Cir. 1995) 46 F.3d 52, 53.

10 Here, Plaintiff’s failure to file any opposition should be construed as his consent to
 11 arbitrate all his claims against Defendants consistent with the subject arbitration agreement.

12 **IV. CONCLUSION**

13 As established in Defendants’ moving papers, Plaintiff is the subject of a valid,
 14 irrevocable and fully enforceable Agreement to arbitrate his disputes with his former employer,
 15 Hustler and its’ alleged agent, BSM. As such, and in light of Plaintiff’s failure to file any
 16 opposition to this motion, Hustler and BSM respectfully request that the Court order the claims of
 17 Plaintiff into binding arbitration pursuant to the agreements of the parties and stay this civil
 18 proceeding pending completion of arbitration.

19
 20 Dated: December 4, 2007

21
 22 LONG & LEVIT LLP

23 By

24
 25 DOUGLAS J. MELTON
 26 JOHN B. SULLIVAN
 27 Attorneys for SAW Entertainment, LTD
 28 d/b/a Hustler Club-San Francisco

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PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within action. My business address is Long & Levit LLP, 465 California Street, Suite 500, San Francisco, California 94104.

On December 4, 2007, I served the document(s) named below on the following attorney(s) of record and/or interested parties in the case of *Kressy v. Larry Flynt's Hustler Club San Francisco, et al.*, United States District Court Northern District of California Case No. C-07-4892-EDI.

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL
ARBITRATION AND STAY COURT PROCEEDINGS**

SERVED ON:

Peter E. Kressy 517 Broadway, Number 21 San Francisco, CA 94133	
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- (BY MAIL) I am readily familiar with Long & Levit LLP's practice for collection and processing of documents for mailing with the United States Postal Service. I caused such document(s) to be placed in a sealed envelope, addressed to the person(s) on whom it is to be delivered pursuant to the attached service list, with postage thereon fully prepaid, to be deposited with the United States mail at San Francisco, California, that same day in the ordinary course of business.
- (BY ELECTRONIC FILING) I electronically filed the document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the person(s) or attorney(s) of record at the listed email address.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2007, at San Francisco, California.



Cindy C. Ratcliff

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